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The United States Circuit Court for the Northern District of California, in the case of Lowry v. Tile, Mantel & Grate Association, has recently construed the act of congress commonly known as the "Sherman Anti-Trust Act." The corporation proceeded against was organized for the purpose, as declared in its constitution and the preamble thereto, of uniting "all acceptable dealers" in tiles, fire place fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. Its constitution and by-laws provided that its active members should consist of dealers in such articles in San Francisco and vicinity, carrying a stock of a stated value, who should be elected to membership, each of whom should pay an entrance fee and annual dues, and the non-resident members should embrace all manufacturers throughout the United States who signed the constitution and paid the entrance fee. They provided that no dealer and active member should purchase from any manufacturer or his agent who was not a member of the association, nor sell any unset tiles to any person not a member for less than the list price, and that no manufacturer who was a member should sell his products to any dealer who was not a member. It was held that such association was illegal and in violation of sections 1 and 2 of the anti-trust act of July 2, 1890, being a combination in restraint of trade and commerce among the States, by imposing a tax on such commerce between its members, to the extent of the membership fees and dues, and an attempt to monopolize a part of the trade in the articles named between the manufacturers in other States and the dealers in San Francisco, which, in operation, did effect such monopoly, and that under section 7 of such act such association and its members were liable in treble damages to a dealer, not a member of the combination, whose business was injured thereby.

The Supreme Court of Indiana has held, in the case of Hurley v. Eddingfield, that a physician licensed to practice medicine under the statutes of that State is not liable for arbitrarily refusing to respond to a call, although he is the only physician available. The licensing acts of Indiana apparently are in the usual form of such legislation, providing for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license. The court calls attention to the fact that "the act is a preventative, not a compulsive, measure. In obtaining the State's license (permission) to practice medicine, the State does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers and the like, are beside the mark." The recent case of Lathrop v. Flood, decided by the Supreme Court of California, though on a similar subject, involves a somewhat different question. It there appeared that defendant was employed to attend plaintiff during her first confinement. He assumed charge of the case, visiting plaintiff at intervals, until he deemed it the proper time to employ instruments to aid in the delivery of the child, whereon the plaintiff shrank back and screamed, compelling the defendant to let go the instruments. Defendant threatened the plaintiff that if she did not quit screaming he would quit the case, and on the failure of a second or third attempt to use the instruments he abruptly left the house. This was at midnight, and it was an hour or more before another physician could be obtained, who, on examination, found that plaintiff's condition was not such as to require the use of instruments just then. Thereafter the plaintiff was safely delivered with the use of instruments. The court remarks in the opinion that "it does not appear that defendant's treatment of the case up to the time of his abandonment of it was either negligent or unskillful. It does not appear that undue physical injuries were inflicted by his treatment, either upon the mother or the child. If either suffered in this respect it is demonstrated that the actuating cause was the conduct of the patient in moving and shrinking while the instruments were actually inserted." It was held that a verdict of

$2,000 was not excessive for the unwarranted abandonment of the case and the suffering occasioned plaintiff thereby. The main point involved in this litigation was that "it is the undoubted law that a physician may elect whether or not he will give his services to a case, but, having accepted his employment and entered upon the discharge of his duties, he is bound to devote to the patient his best skill and attention, and to abandon the case only under one of two conditions: First, where the contract is terminated by the employer, which termination may be made immediate; second, where it is terminated by the physician, which can only be done after due notice and an ample opportunity afforded to secure the presence of other medical attendance." The court cites Barbour v. Martin, 62 Me. 536; Ritchey v. West, 23 Ill. 329; Lawson v. Conaway, 37 W. Va. 159; which tend to support the position taken.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS—ALIGHTING FROM TRAIN AT INTERMEDIATE STATIONS.—In Lemery v. Great Northern Railway Company, 85 N. W. Rep. 908, decided by the Supreme Court of Minnesota, the rule is recognized that where a through passenger upon a railway train, without objection by the company or its agents, alights from the train at an intermediate station for any reasonable and usual purpose, such station being one for the discharge and reception of passengers, he does not cease to be a passenger and is entitled to the protection accorded to such by law. It was further held, however, that a through passenger on a through train—one that does not stop at intermediate stations to receive or discharge passengers—who leaves the train without the knowledge, consent or invitation of the company at an intermediate station, at which the train stops for some purpose incident to its operation and management only, abandons for the time being his relation as a passenger and assumes all risks incident to his movements.

TELEGRAPH COMPANY — DAMAGES — MENTAL SUFFERING—CONFLICT OF LAWS.—It is held by the Court of Civil Appeals of Texas, in the case of Thomas v. Western Union Telegraph Company, 61 S. W. Rep. 501, that where a telegram, which is not delivered, is sent from a point in a sister State to another point therein, mere residence in another State does not authorize a recovery in the latter for mental anguish caused by failure of the company to deliver a message as authorized by the laws of the latter State, where such suffering is not an element of damages recognized in the former State; that where the laws of the State in which mental anguish is cause by failure of a telegraph company to transmit and deliver a message between different points within the State does not allow damages for such suffering, such damages will not be allowed in an action, in another State acquiring jurisdiction of the parties, since the law giving immunity from certain damages is a substantial right, and is governed by the law of the place where the injury occurs, and not by the law of the forum, and that where the failure to transmit and deliver a telegram between points in a State whose laws do not allow damages for mental anguish causes such anguish to a citizen of Texas, the fact that such suffering continues after his return to the latter State does not authorize a recovery for such suffering.

CONSTITUTIONAL LAW — LODGING HOUSES — DISCRIMINATION.—In Bailey v. People, 60 N. E. Rep. 98, decided by the Supreme Court of Illinois, it was held that a statute regulating the number of people a lodging house keeper may permit to sleep in one room contravenes that provision of the constitution of Illinois which provides that no person shall be deprived of property without due process of law, such statute being discriminatory against lodging house keepers as a class, because not affecting keepers of similar houses of public entertainment, such as inns, hotels and boarding houses. The court said in part:

"The keeper of a lodging house is not, in a legal sense, an innkeeper, a hotel keeper or a boarding house keeper. Car Co. v. Smith, 73 Ill. 360; 16 Am. & Eng. Ency. Law (2d Ed.), p. 510. Hotel inn and boarding house keepers are given a lien upon the baggage of their guests by paragraph 42 of chapter 82 (Starr & C. Ann. St., 1896, p. 2581), and keepers of inns or hotels and keepers of boarding houses are by the common law answerable under a different rule of liability for the loss of the effects of their guests. 16 Am. & Eng. Ency. Law (2d Ed.), 530, 532. Our statute in respect of the liability for the safe custody of the property of guests applies only to landlords and keepers of public inns and hotels, and the keepers of the various places of public entertainment may so conduct their business as that they may bear the relation of an inn or hotel keeper to some of their guests, and that of a boarding house keeper or lodging house keeper to others; but, nevertheless, lodging house keepers constitute a class distinguishable from the keepers of other houses of public entertainment, such as hotels, inns, taverns or boarding houses. This legislation is directed only against lodging house keepers. Keepers of boarding houses, inns, hotels and taverns do not fall within the purview of its prohibition. If the enactment is a valid one, inn or hotel keepers and the keepers of boarding houses may lodge seven or any greater number of guests or patrons in the same room at the same time for sleeping purposes as may suit their convenience, subject only to the consent of their patrons or

guests, without incurring the penalties which, under the provisions of this enactment, would be visited upon a lodging house keeper should he allow more than six persons to occupy the same sleeping apartment at the same time. This is to discriminate against the lodging house keepers as a class, and to deprive them of liberty and a property right which other persons engaged in business of the same general character and similarly conducted may freely exercise without let or hindrance. * * * The attorney-general concedes that the term 'lodging house,' and the words 'inn,' 'hotel, or 'boarding house,' are none of them convertible terms or words, and that a distinction exists between these several institutions and a lodging house; but he insists that the act, though it has no penalties against the inn or hotel keeper or boarding house keeper, may be legally enforced against the keepers of lodging houses as a sanitary measure, under the police power. Some lodging houses, it is urged, may be, and doubtless are, the recognized abiding places of unclean, diseased and vermin-infected guests or patrons, who, together with the owners or keepers of the lodging houses, are wholly indifferent to sanitary conditions, rendering such houses sources of contagious and infectious diseases. But it cannot be asserted that all lodging houses are of this character; neither can it be said boarding houses, inns and hotels are not to be found which shelter the same class of patrons, and whose keepers are likewise indifferent to sanitary conditions. The public health is less endangered by a cleanly and well-conducted lodging house than by a filthy, ill-managed, disease-breeding hotel or boarding house. The lodging of more than six persons in any one room in a cleanly lodging house cannot be condemned from a sanitary point of view, any more than the lodging of a like number of guests in one room in a hotel or boarding house. If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging house, boarding house or hotel, and, as its penalties are not so leveled, it can but be regarded as partial and discriminatory legislation."

BANKRUPTCY — ASSETS — SEAT IN STOCK EXCHANGE.—In a proceeding entitled *In re* Page, 107 Fed. Rep. 89, decided by the United States Circuit Court of Appeals, Third Circuit, section 70 of the Bankruptcy Act of 1898 was considered, which declares that the bankrupt's trustee on his appointment and qualification shall be vested with the bankrupt's title to all property which prior to the filing of the petition the bankrupt could by any means have transferred. It appeared that the Philadelphia Stock Exchange rules provide that any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with, or claims against him by, any member of the stock exchange, etc., subject, however, to the approval of the proper authorities of the exchange. It was held that, as a bankrupt who was a member of said exchange and had no unsettled accounts with other members at the time of filing his petition in bankruptcy could have transferred his seat, which was a valuable right, within section 70, such right of transfer passed to the trustee in bankruptcy, who was entitled to sell the same as part of the bankrupt's assets. The court said in part:

"The by-laws do not contain any provision relating to membership or its transfer. The cases principally relied on by the bankrupt in support of his contention that title to the seat or membership did not pass to the trustee relate to the Philadelphia Stock Exchange, and are Thompson v. Adams, 93 Pa. 55, and Pancoast v. Gowen, 93 Pa. 66. The court in the former case said that, 'the seat is not property in the eye of the law, it could not be seized in execution for the debts of the members,' and in the latter, that 'a seat in the board of brokers is not property subject to execution in any form.' In Thompson v. Adams it appears that Richards took the legal title to a seat or membership in the exchange, Thompson furnishing to him the purchase money. Richards died indebted to sundry members of the exchange in amounts exceeding in the aggregate such purchase money, and was at the time of his death the only known owner, legal or equitable, of the seat. Nor had his creditors in the exchange any knowledge or notice that his seat had been paid for with the money of another. Pursuant to the provisions of the constitution, the seat was sold by the secretary for a sum less than Richards' indebtedness to the members of the exchange, and the point to be determined was whether Thompson was entitled as against such creditors to the whole or any portion of the proceeds of sale. It was held that he was not; the constitution providing that when a member died his seat might be sold by the secretary and that the balance of the proceeds after satisfying the claims of the members of the board should be paid to his legal representatives. In Pancoast v. Gowen an attachment execution was issued on a judgment obtained by Pancoast against Houston and was served upon the members of the Philadelphia Stock Exchange as garnishees, who admitted that the defendant owned a seat in the exchange, but averred that 'at the service of this writ they held no property of any kind, attachable at the suit of the plaintiff, belonging to Joseph L. Houston, the seat belonging to him not being property, except between members of the Philadelphia Stock Exchange.' It was held that the seat was not subject to the attachment execution. The points actually determined in these two cases do not support the unqualified *dictum* contained in one of them that 'the seat is not property in the eye of the law.' In Barclay v. Smith, 107 Ill. 349, it was held that a certificate of membership in the Board of Trade of the city of Chicago was not property liable to be

subjected by a creditor's bill to the payment of debts of the holder. The language of the court certainly went very far. Although the certificate of membership was 'regarded in the market as worth $4,000,' it was said that it did not come within any definition of property, and was not property at all, but a 'mere privilege conferred upon the member.' In Weaver v. Fisher, 110 Ill. 146, it was held, however, that a bill in chancery would lie to compel the surrender of a certificate of membership in the Chicago Board of Trade which had been procured with the complainant's money, but taken in the name of the defendant, who was her agent. The court among other things said:

"'It is misapprehension to suppose, as counsel for plaintiff in error seem to, that we held in Barclay v. Smith, 107 Ill. 349, that there are no property rights of any kind in a certificate of membership in the Board of Trade of the city of Chicago. We simply there held that such a certificate is not property which is liable to be subjected to the payment of the debts of the holder by legal proceedings. · · · It cannot be said here that we must, from the nature of this corporation, hold there can be no pecuniary value in a certificate of membership, because the proof shows the contrary with absolute certainty. It has a regular pecuniary market value, notwithstanding the conditions to which the transfer of its title is subject.'

"The material inquiry before us is not whether the seat could have been attached or taken in execution, but whether it was not property which Page prior to his bankruptcy could have transferred. The Bankrupt Act vests in the trustee the title not only to the property of the bankrupt which prior to the filing of the petition 'might have been levied upon and sold under judicial process against him,' but, as has been stated, to property which prior to that time 'he could by any means have transferred.' The membership or seat of the bankrupt in the exchange certainly was of pecuniary value to him and, subject to the restrictions and limitations of the constitution, could have been transferred by him to another. Section 4 of article 11 provides that 'any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the stock exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker.' It appears that the bankrupt had at the time of the adjudication no such unsettled contracts or claims against him, and that the value of his seat or membership amounted to a substantial sum of money. It is true that the approval of the proper authorities in the exchange was necessary to a valid transfer of the membership, and that, as such approval might or might not be withheld, this requirement might prevent a transfer to a given person. This contingency possibly affected the value of the seat for the purposes of sale, but, while restricting, did not destroy its transferability. The membership was more than a mere privilege. It was property vested in Page and transferable to any person meeting the approval of the exchange. On principle we perceive no reason why the seat of the bankrupt was not embraced in 'property which, prior to the filing of the petition, he could by any means have transferred.' We are aware that in the case of *In re* Sutherland, 23 Fed. Cas. 453, No. 13,637, Judge Blodgett held that, under the Bankruptcy Act of 1867, membership in the Chicago Board of Trade was not an asset which passed to an assignee in bankruptcy. The authorities to the contrary, however, are quite conclusive. Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; *In re* Ketchum, D. C., 1 Fed. Rep. 840; *In re* Warner, D. C., 10 Fed. Rep. 275; *In re* Werder, C. C., 15 Fed. Rep. 789; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. Rep. 104, 35 L. Ed. 915."

SITUS OF A DEBT IN GARNISHMENT PROCEEDINGS.

Section 1. Preliminary.—What is the *situs* of a debt for the purposes of attachment and garnishment? is a question upon which the decisions of the various courts of this country are not in harmony. As a matter of fact "the law relating to the *situs* of choses in action is in a great state of confusion—in an unscientific, not to say nebulous, condition."[1] This is equally true in whichever of the various ways it may come before the courts, to-wit: 1. In cases relating to the administration of the estates of deceased persons. 2. In cases of gifts by will of personal property in a particular locality. 3. In cases of taxation. 4. In cases under State insolvency laws. 5. In cases of foreign attachment. This article is concerned only with the law as to the *situs* of the debt for the purposes of foreign attachment and garnishment, or trustee process, where that is the local process by which creditors reach and appropriate the property and assets of debtors found within the State, —which latter process obtains in Massachusetts, New Hampshire and elsewhere. For-

[1] Kerr on Attachments, § 35.

eign attachment and garnishment, as well as trustee process, is an ancillary process in aid of a suit already brought, and may be resorted to either before or after judgment, under statutory provisions. The process is entirely independent of the action, except by relation to it as the foundation for the issuance of the process. A garnishment may be said to be an attachment by means of which money or other property of a debtor in the hands of a third person or persons, which cannot be levied upon, may be subjected to the creditor's claim.[2] The effect of a garnishment is to give notice to the attachment debtor's debtor, the garnishee, not to pay the money he is owing to the attachment defendant until the claim of the attachment plaintiff has been adjudicated, and, if the claim is sustained, not until the judgment has been satisfied. It is not in the nature of a judgment against the garnishee. All the right the attachment plaintiff acquires is such, and only such, as the attachment defendant may have against the garnishee—the right to sue and enforce the claim to the extent of the garnishee's liability.

Sec. 2. Modes of Acquiring Jurisdiction.—The only method in which a court can acquire jurisdiction in a cause other than by personal service of process upon the defendant, is by subjecting his property within the territorial jurisdiction of the court to its writ. Jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for otherwise there can be no sovereignty exerted upon the well known maxim, *extra territorium jes decenti impune non parentur.* No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every attempted execution of authority of this sort beyond this limit is a mere nullity, and incapable of binding such person or property in any other tribunals. Before the court can make any order which will be binding upon the garnishee, or the parties to the original action, it must acquire jurisdiction in the premises. Jurisdiction in attachment and garnishment proceedings is acquired in one of two methods, to-wit, by proceeding: 1. Against the person of the defendant by the personal services of process. 2. Against the *res*, that is, the property or assets of the defendant found within the jurisdiction of the court.[3] The object of attachment and garnishment laws is to reach property or credits of the defendant in attachment in the jurisdiction of the court whose aid is invoked. Before jurisdiction can be acquired by the court two things are requisite, to-wit: 1. There must be property of the defendant, tangible or intangible, to be affected by the process of the court. 2. That property must be within the territorial jurisdiction of the court. Where the property is of a tangible character, but little difficulty is experienced; but when the property is of an intangible character, such as credits and choses in action, there is much conflict in the decisions, due, no doubt, to the adoption, in some instances, of a shifting rule as to the *situs* or location of the property to be reached.[4] For instance, if a person residing within the State and subject to the jurisdiction of the court whose aid is invoked has contracted with the defendant in attachment, who is a non-resident, which contract is to be performed or the money called for is to be paid out of the State, will he be subject to garnishment process in the State of his domicile? According to the current of authorities and the weight of decision, this liability will depend upon what is to be regarded as the *situs* of the debt owing under such a contract. Garnishment, like attachment, is a proceeding *in rem*. The court acquires jurisdiction of the person *pro hoc vice* by seizing his property, goods or choses in action. If it cannot acquire jurisdiction or control over the *res*, it needs must fail to acquire through such *res* jurisdiction of the person, for jurisdiction of the person is acquired only through the *res* or thing attached.[5] No court acquires jurisdiction in attachment or garnishment proceedings unless the *res* is either actually or constructively within the territorial jurisdiction of the court granting the order.[6] In other

[2] American Cent. Ins. Co. v. Hettler, 37 Neb. 849.

[3] Kerr on Attach. § 168. See Pennoyer v. Neff, 95 U. S. 714; bk. 24 L. Ed. 565; Boswell v. Otis, 50 U. S. (9 How.) 336; bk. 13 L. Ed. 164.

[4] Kelley Co. v. Garvin Machine Co., 4 Ohio Dec. 374, 376.

[5] Louisville & N. R. Co. v. Dooley, 78 Ala. 525.

[6] Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N.

words, before the court can acquire jurisdiction to grant or issue the process the *situs* of the *res*, the debt, or chose in action, must be within the territorial jurisdiction of the court.[7] If the *situs* of the debt is beyond the territorial jurisdiction of the court issuing the process, the court cannot obtain control of the *res*, or make any binding disposition of it; for process of attachment or garnishment cannot change the rights of property situated beyond the territorial jurisdiction of the court.[8] A review of the authorities shows that the question has been frequently presented to the courts of this country, and the uniform tenor of the decisions establishes the doctrine that a court cannot obtain jurisdiction in an attachment or garnishment process where the defendant in attachment is not a resident of the State where the writ issues, and the garnishee has no property of the attachment defendant in his hands, or is not bound to pay him money or deliver him goods in the State where the process issues.[9]

Sec. 3. The General Doctrine as to Situs.—The whole structure or framework, if it may be so called, of the doctrine of the *situs* of a debt or chose in action, rests upon the fiction of law that the debt follows the domicile or home of the debtor, has locality where he resides, and can there be enforced; that is, the money can there be collected by legal process. In the law of attachments the basic principle is that the *situs* of the debt is the home of the debtor. It is regarded as local and not transitory; it does not follow the person of the debtor whithersoever he may travel; consequently an attachment or garnishment process cannot be served upon him in any jurisdiction where such debtor may be for the time temporarily sojourning.[10] The general rule is that the *situs* of the debt is the residence of the debtor,[11] although some of the cases hold that, in the absence of a stipulation to the contrary, it is the residence of the creditor,[12] and it is said by a Missouri case that "debts have no *situs* but may be attached in any other State than the one in which the debtor (in attachment) is resident.[13] Neither of these latter holdings are in harmony with the current of decision and weight of authority.

Sec. 4. Exception to the Rule.—To the general rule that the *situs* of the debt attaches to the person of the debtor and its *locus* is the debtor's domicile, there are some well ascertained exceptions. The first is where the debt is contracted out of the State and there is no specified place of payment or performance, in which case the place of performance is presumed to be the *loci contractus*.[14] In those cases where the debt arose out of the State, it must be made payable in the State to give the courts of the

Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393. See also cases cited in next note.

[7] Alabama, G. S. R. Co. v. Chumley, 92 Ala. 317; Louisville & N. R. Co. v. Dooley, 78 Ala. 524; Atchison, T. & S. F. R. Co. v. Maggard (Colo.), 39 Pac. Rep. 985; Mo. Pac. R. Co. v. Sharitt, 43 Kan. 375; Danforth v. Penny, 3 Metc. (Mass.) 564; Hamilton v. Plumer (Mich.), 34 N. W. Rep. 278; Illinois Cent. R. Co. v. Smith (Miss.), 12 South. Rep. 461; American Cent. Ins. Co. v. Hettler, 37 Neb. 849; Turner v. Sioux City & P. R. Co., 19 Neb. 241; Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175; Matthews v. Smith, 13 Neb. 178; Lawrence v. Smith, 45 N. H. 533; Sawyer v. Thompson, 24 N. H. 510, 513; Jones v. Winchester, 6 N. H. 497; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393; Remier v. Hurlbert (Wis.), 50 N. W. Rep. 783.

[8] Louisville & N. R. Co. v. Dooley, 78 Ala. 524; American Cent. Ins. Co. v. Hettler, 37 Neb. 849; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393.

[9] See Green v. Farmers' & Citizens' Bank, 25 Conn. 452; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433; Mo. Pac. R. Co. v. Moltby, 34 Kan. 125; Nye v. Liscombe, 21 Pick. (Mass.) 263; Tingely v. Bateman, 10 Mass. 350; Keating v. Am. Ref. Co., 32 Mo. App. 91; Fielder v. Jessup, 24 Mo. App. 91; Sawyer v. Thompson, 24 N. H. 510; Strauss v. Chicago Glyc. Co., 108 N. Y. 654, 46 Hun (N. Y.), 216; Baylies v. Houghton, 15 Vt. 626.

[10] Danforth v. Penny, 3 Metc. (Mass.) 564; Nye v. Liscombe, 38 Mass. (21 Pick.) 263; Tingley v. Bateman, 10 Mass. 349; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393; Kelley Co. v. Gavin Machine Co., 4 Ohio Dec. 374. For contrary doctrine see *post.* text immediately preceding footnote 38.

[11] See Root v. Davis, 51 Ohio St. 29; Owen v. Miller, 10 Ohio St. 136; Cottin Co. v. Wilson Co., 123 Ind. 447, 483; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393; Tuller v. Arnold, 93 Cal. 166, 28 Pac. Rep. 863; Kelley v. Gavin Machine Co., 4 Ohio Dec. 374, 376; Sawyer v. Thompson, 24 N. H. 510; Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175; American Cent. Ins. Co. v. Hettler, 37 Neb. 849; Hamilton v. Plumer (Mich.), 34 N. W. Rep. 278.

[12] Louisville & N. R. Co. v. Dooley, 78 Ala. 525; Taylor v. Life Assoc. of America, 13 Fed. Rep. 493; Kirtland v. Hotchkiss, 100 U. S. 491 (for purposes of taxation).

[13] Howland v. Railroad Co., 134 Mo. 474.

[14] See Dulton v. Shelton, 3 Cal. 206; Eck v. Hoffman, 55 Cal. 501; Tuller v. Arnold, 93 Cal. 166, 28 Pac. Rep. 863.

State jurisdiction in garnishment.[15] The second exception many of the courts make is where the debt is made payable or contract is performable out of the State, because in such a case the courts of the State can acquire no jurisdiction over the *res*, even though the debtor reside within the State. In such a case the domicile of the debtor is not the *situs* of the debt, but the place of performance, and the courts of the place of performance have jurisdiction.[16] The reason for both these exceptions is founded upon the doctrine of the *situs* of the debt. One of the reasons for the conflict in the authorities on this subject is the adoption by some of the courts of the doctrine of a shifting *situs*. It is a well established rule that the fiction of law, that the domicile of the owner draws to it his personal estate, wherever it may happen to be, yields whenever, for the purpose of justice, the actual *situs* of the property should be examined.[17] It is in obedience to this principle that the domicile of the debtor and not that of the creditor is regarded as the *situs* of the debt, and is to be reached only by process issued by a court having jurisdiction in the *locus* of the *situs* of the debt. There are substantial reasons for this rule, and very substantial objections against it.

Sec. 5. Decisions for and Against the Rule.—The rule above laid down in respect to the *situs* of a debt or chose in action has been adopted, among other States, in Alabama,[18] California,[19] Indiana,[20] Massachusetts,[21] Michigan,[22] Nebraska,[23] New Hampshire,[24] New York,[25] Ohio,[26] and the United States Supreme Court,[27] and United States Court of Appeals for the Michigan District.[28] The rule seems to be repudiated in Illinois,[29] Minnesota,[30] Missouri,[31] New Jersey and Wisconsin.[32]

Sec. 6. When Debt Made Payable Out of State.—In those cases where the contract is performable or the debt made payable out of the State in which the garnishee resides, the *situs* of the debt is not the domicile of such garnishee debtor but the place where the contract is performable or the money payable, and such debt cannot be reached by garnishment process issuing from a court at the domicile of the debtor.[33] In the case of Dulton v. Shelton[34] merchandise was sold in Boston to a resident of San Francisco and forwarded to the purchaser under contract, whereby the purchaser was to pay by remitting funds to Boston, and the court held the

[15] *Id.*; Kelley v. Garvin Machine Co., 4 Ohio Dec. 374; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393.

[16] See Burckle v. Eckhart, 3 N. Y. 132; Campbell v. Champlain R. Co., 18 How. Pr. (N. Y.) 412; Johnson v. Tobacco Co., 14 Hun (N. Y.), 89; Hibernia Nat. Bk. v. Lacombe, 84 N. Y. 367; Hiller v. Burlington R. Co., 70 N. Y. 223; Fries v. Mass. Ben. Soc., 15 N. Y. 71; Perry v. Erie Transfer Co., 7 N. Y. S. Rep. 639; Connecticut Mut. Ins. Co. v. Cleveland, 26 How. Pr. (N. Y.) 225.

[17] See Green v. Van Buskirk, 74 U. S. (7 Wall.) 139, bk. 19 L. Ed. 109; Warren v. Jeffries, 96 N. Y. 248, 255.

[18] See Alabama G. S. R. Co. v. Chumley, 92 Ala. 317; Louisville & N. R. Co. v. Dooley, 78 Ala. 525.

[19] See Tuller v. Arnold, 93 Cal. 166, 18 Pac. Rep. 863; Eck v. Hoffman, 55 Cal. 501; Dulton v. Shelton, 3 Cal. 207.

[20] Cottin v. Wilson Co., 123 Ind. 447; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433.

[21] Nye v. Liscombe, 21 Pick. (Mass.) 263; Danforth v. Penny, 3 Metc. (Mass.) 564.

[22] Hamilton v. Plumer (Mich.), 34 N. W. Rep. 278.

[23] See American Cent. Ins. Co. v. Hettler, 37 Neb. 849; Turner v. Sioux City & P. R. Co., 19 Neb. 241; Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175.

[24] See Lawrence v. Smith, 45 N. H. 533; Sawyer v. Thompson, 24 N. H. 510, 513; Jones v. Winchester, 6 N. H. 497.

[25] See Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 219, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393.

[26] See Owen v. Miller, 10 Ohio St. 136; Kelley Co. v. Gavin Machine Co., 4 Ohio Dec. 374, 376.

[27] Railway v. Strum, 19 Sup. Ct. Rep. 797.

[28] Reimers v. Seatco Mfg. Co., 70 Fed. Rep. 573.

[29] Pomeroy v. Rand, 157 Ill. 176.

[30] Harvey v. Great N. R. Co., 50 Minn. 405.

[31] Howland v. Railroad Co., 134 Mo. 474; Mfg. Co. v. Long, 127 Mo. 242, 54 Mo. App. 147.

[32] Ins. Co. v. Chambers (N. J.), 32 Atl. Rep. 663; Bragg v. Gaynor (Wis.), 21 L. R. A. 161.

[33] See Alabama, G. R. R. Co. v. Chumley, 92 Ala. 317; Louisville & N. R. Co. v. Dalton, 78 Ala. 524; Tuller v. Arnold, 93 Cal. 166, 18 Pac. Rep. 863; Eck v. Hoffman, 55 Cal. 501; Dulton v. Shelton, 3 Cal. 207; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433; Illinois Cent. R. Co. v. Smith (Miss.), 12 South. Rep. 461; Bullard v. Cameron (Neb., Dec. 4, 1900), 84 N. W. Rep. 604; American Cent. Ins. Co. v. Hettler, 37 Neb. 849; Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175; Lawrence v. Smith, 45 N. H. 533; Jones v. Winchester, 6 N. H. 497; Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun (N. Y.), 393; Hibernia Nat. Bk. v. Lacombe, 84 N. Y. 367; Burkle v. Eckart, 3 N. Y. 132; Perry v. Erie Transfer Co., 7 N. Y. S. Rep. 639; Connecticut Mut. L. Ins. Co. v. Cleveland, 26 How. Pr. (N. Y.) 225; Campbell v. Champlain R. Co., 18 How. Pr. (N. Y.) 412; Fries v. Mass. Ben. Soc., 5 N. Y. Supp. 71; Kelley v. Gavin Machine Co., 4 Ohio Dec. 374; Railway Co. v. Strum, 19 Sup. Ct. Rep. 797; Central Trust Co. v. Chattanooga, R. & C. R. Co., 68 Fed. Rep. 685; Reimers v. Seatco Mfg. Co., 70 Fed. Rep. 573.

[34] 3 Cal. 207.

situs of the debt was Boston and not San Francisco, and that the money due under the contract could not be garnished in San Francisco. In Tuller v. Arnold[35] the garnishee purchased goods in Chicago which were shipped and delivered to him in San Francisco under a contract to pay in Chicago "in par funds, no allowance to be made for exchange or express charges." The court held that the money was payable in Chicago, that the *situs* of the debt was there, and that the money could not be garnished in San Francisco. In Kelley v. Garvin Machine Co.,[36] on the order of parties domiciled and doing business in Cincinnati, goods were delivered in Chicago, payment for which was to be made in Chicago. On suit brought in a Cincinnati court it was held that there was no jurisdiction of the *res*, and the garnishment was dismissed. In the case of Reimers v. Seatco Manufacturing Company[37] there is an instructive review of the law on the question involved in this discussion, and a very clear and able opinion by that eminent jurist, Mr. Judge Taft. In this case an attempt was made, in a suit brought in a Michigan court by a citizen of Chicago to garnishee a debt due to the Seatco Manufacturing Company, a corporation organized under the laws of the State of Washington, from the Michigan Peninsular Car Company, a corporation of the State of Illinois, having an office and place of business in the State of Michigan, where it was properly served with garnishment process under the laws of Michigan. The debt sought to be reached was payable in the State of Washington. In the lower court the defendant moved to quash the writ of garnishment and dismiss for want of jurisdiction, which motion was granted, and that judgment was affirmed by the court of appeals. In announcing the opinion of the lower court Judge Taft says:

"The question in this suit is whether, in a suit brought by a resident and citizen of Illinois against a resident and citizen of the State of Washington in the State of Michigan, a court of the latter State can acquire jurisdiction *in rem*, to pronounce judgment against the non-resident defendant to the extent of a debt owed to the defendant by a corporation resident and citizen of Illinois doing business in Michigan, and liable by the laws of Michigan to the service of process in garnishment in that State. The question of jurisdiction is raised by the defendant against whom such a judgment is sought. It may be conceded that under the statutes of Michigan a corporation of another State which assumes to do business in Michigan subjects itself, through its agent in that State, to service of process by garnishment. But this does not determine the question whether a creditor of such corporation is affected by this fact so that the debt owing is given a locality and *situs* within the State lines of Michigan such as to permit the courts of Michigan, under general principles of international law and the constitution of the United States, to seize the debt. The debt was not payable in Michigan but Washington. We conceive it to be well established by authority that while, generally speaking, the *situs* of a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial sovereignty. We also conceive it to be well settled that, even if the debtor is not a resident of the sovereignty under which garnishment is attempted, such sovereignty still may subject the debt to its process and constructive seizure if the debtor is personally within the service of its process[38] and the debt is payable within its territory. In either of the cases above mentioned, if a judgment is rendered against the garnishee for the debt thus constructively seized in favor of the plaintiff, the satisfaction of the judgment will be *pro tanto* a bar to a recovery against a garnishee on the original debt in any jurisdiction where the creditor seeks to recover it. But we are of the opinion that a non-resident creditor cannot have his property in the debt seized in a State to which the debtor may resort, not for purpose of residence, but merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the State, and the debtor does not reside therein.[39] But it is said that if the

[35] 93 Cal. 166, 18 Pac. Rep. 863.
[36] 4 Ohio Dec. 374.
[37] 70 Fed. Rep. 573.

[38] For contrary doctrine see *ante*, § 3.
[39] To same effect is Douglass v. Phœnix Ins. Co. of Brooklyn, 138 N. Y. 209, 33 N. E. Rep. 938, 63 Hun

debtor is a corporation and seeks to do business outside of the State of its incorporation, the State to which it may send its agents for this purpose may impose any requirement whatever as a condition precedent to its doing business there, and, therefore, that it may require it to submit to judgment in garnishment for a debt owing by it to a non-resident though payable in another State. The right to impose conditions upon foreign corporations doing business therein is not unlimited. If, as we have already found, the debt to be garnished was not brought within the State by presence of the debtor corporation through its agent, then a condition that the corporation must be subject to garnishee process as if the debt were within the State's jurisdiction would have one of two results: It would either subject the corporation to the probability of a double recovery for the same debt, or it would compel the creditor, a non-resident, whose person and property are both out of the jurisdiction of the State, to submit to a judgment against him, rendered without notice of any kind to him. Either result would seem to be inconsistent with the rules of public law securing the jurisdiction and authority of each State from encroachment by all others, and with that principle of natural justice forbidding condemnation without opportunity for defense."

Sec. 7. Dissent from the Rule.—The States of Illinois, Minnesota, Missouri, New Jersey and Wisconsin seem to stand alone in their dissent from the rule that where a debt is made payable out of the State to a person who is a non-resident of the State, that garnishment proceedings will not lie in the State. In the case of Pomeroy v. Rand[40] the plaintiff brought suit in Chicago against the Kalamazoo Paper Company and garnisheed Rand, McNally & Company. The garnishee answered that it was indebted to the Michigan company, but that the debt was payable in Michigan. Judgment was rendered against the defendant in attachment and also against the garnishee. On appeal to the circuit court the garnishee objected to the jurisdiction of the court, for the reason the court below had no jurisdiction of the debt due from the garnishee to the defendant in attachment, for the reason that the debt was payable in the State of Michigan where the defendant resided. The supreme court held the proposition was untenable. The court say: "While it is true that for certain purposes the *situs* of a debt is at the residence of the creditor, it is certainly not true that the collection of the debt cannot be enforced where the debtor resides. Under our statute a creditor may have an attachment against his debtor, where he is a non-resident of the State and have garnishee process against all persons indebted to said debtor, and we know of no rule of law which limits that right to debts having their *situs* in this State." In the case of Harvey v. The Great Northern Railroad[41] the court say: "While, by fiction of law, a debt like other personal property is for most purposes, as, for example, transmission and succession, deemed attached to the person of the owner, so as to have its *situs* at his domicile, yet this fiction always yields to laws for attaching the property of non-residents, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicile. For such purposes a debt has a *situs* wherever the debtor or his property can be found. Where the creditor might maintain suit to recover the debt there it may be attached as his property, provided, of course, the laws of the forum authorize it.[42] Neither is it material that the debt was not made payable in Montana. It was a debt from the defendant everywhere. The original creditor might have maintined a suit for it in Montana, and, therefore the debt might be attached there."[43] The Supreme Court of Missouri hold that "debts have no *situs*, but may be attached in any State other than that in which the debtor is resident."[44] In the case of Manufacturing Company v. Lang[45] the court say: "We are confronted with contrary rulings of the St. Louis Court of Appeals to the effect that the *situs* of the debt is the place where the debtor resides, *unless the debt, by the terms of the contract, is made*

(N. Y.), 393.

[40] 157 Ill. 176.

[41] 50 Minn. 405.

[42] Citing Embree v. Hanna, 5 Johns. (N. Y.) 101; Blake v. Williams, 6 Pick. (Mass.) 285, 315; Lewis v. Bush, 30 Minn. 287.

[43] Citing Blake v. Williams, 6 Pick. (Mass.) 285, 315.

[44] Howland v. Railroad Co., 134 Mo. 474.

[45] 54 Mo. App. 147, affirmed 127 Mo. 242.

payable elsewhere, and in the latter event such situs is at the place where the debt is payable. To the exception to the rule as indicated by the italicised words thereof we cannot agree for the reasons already stated. We think the rule declared in Harvey v. Railroad Company, 50 Minn. 405, and other cases cited, which are in accord with it, will better subserve interstate trade and business relations than that embraced in the foregoing exceptions." In Insurance Company v. Chambers[46] the New Jersey court say: "The real and only liability of a party as garnishee is by reason of his owing a debt to the defendant in a suit, and the garnishment consists in nothing more than a warning to him not to pay the debt to his creditor until the plaintiff's debt is satisfied. In process of garnishment, as thus understood, the fact that the debt subject to be garnished has its *situs* out of the jurisdiction has never been held to stand in the way of the process of the court. I come, therefore, to the conclusion that the real and only ground of jurisdiction in case of attachment over choses in action is the service within the jurisdiction of warning upon the debtor, and when this is done jurisdiction is obtained." In the case of Bragg v. Gaynor,[47] the Supreme Court of Wisconsin say "that for purposes of attachment and garnishment these debts have been regarded as property in this State and subject to the jurisdiction of its courts. Such result is not considered in conflict with the general rule that the *situs* of personal property is for many purposes, such as taxation, succession and distribution, regarded as having its locality at the domicile of the owner. By force of statute law, as well as public policy declared thereby, and in the decisions of the courts, the *situs* or place where these debts are considered to be with reference to jurisdiction of our courts over them for the purpose of subjecting them to the satisfaction of debts due to a resident of this State from a non resident in order to protect, do justice to and satisfy creditors resident here, is that of such resident debtor owing the same. The right to reach and appropriate such debts for such purposes has been affirmed by numerous adjudications from the earliest period, and it is now too late to attempt to maintain the proposition that for all purposes the *situs* of debts so sought to be reached and applied is at the domicile of such non-resident. They are to be regarded for the purposes of such proceedings as property abiding or being in domicile of the party owing them, and are as much subject to the jurisdiction and control of our courts as tangible property of a non resident found within our jurisdiction."

[46] 32 Atl. Rep. 663.
[47] 21 L. R. A. 161.

§8. *Reasons for the Conflict.*—It is not the purpose of this article to analyze all the cases and point out the errors of principle and of reasoning which lead to the conflict of the decisions on this subject. To do this would require more space than the CENTRAL LAW JOURNAL could reasonably devote to the subject. We may suggest, however, that some of the reasons for the conflict of decisions are: 1. The adoption of the doctrine of a shifting *situs* by some courts. 2. Want of a distinct and proper comprehension of the true doctrine of *situs*. 3. The confounding of the nature of the *situs* of a debt and of the action for its enforcement. The *situs* of a debt is local, whereas the action for its enforcement is transitory.[48]

Omaha, Neb. M. E. E. KERR.

[48] See Central Trust Co. v. Chattanooga, R. & C. R. Co., 68 Fed. Rep. 689, 693.

ELECTRICITY—NEGLIGENCE—TELEPHONES—DEATH BY LIGHTNING—SAFETY APPLIANCES—DANGEROUS POSITION.

GRIFFITH v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

Supreme Court of Vermont, September 19, 1900.

1. Where the death of plaintiff's intestate was caused by lightning, which came over defendant's wire while deceased was sitting in his library, under the telephone which he had rented of defendant, and there killed him, the questions whether there were known appliances by which the danger from such lightning as killed deceased could be averted, and whether defendant was negligent in failing to supply and use such appliances, were for the jury.

2. Plaintiff's intestate was sitting in his library, under a telephone which he had rented from defendant, when a sudden storm arose. A telephone pole was struck by lightning about a quarter of a mile from his house, and the current, passing along the wire through the telephone, passed through his body, killing him. Held, that the question whether he was guilty of contributory negligence in not knowing that defendant had not adopted and maintained proper

appliances to avert such danger, and in sitting where he was when the storm was approaching, was for the jury.

START, J.: The evidence tended to show that the plaintiff's intestate, Dr. Sawyer, was killed by lightning while sitting in his house, under a telephone instrument owned by the defendant, and by the defendant there placed, maintained, and connected with its telephone line and instruments under a contract to do so for a stipulated rent to be paid by the deceased. The plaintiff claims that the lightning came to and entered the house over the defendant's telephone wire; that the defendant was negligent in that it did not provide and maintain, in connection with its wires and instruments, any appliance to conduct the lightning to the ground, or out of the house, without injury to the inmates therein; and that the deceased came to his death by reason of such neglect. It appears that telephone wires from strokes of lightning, atmospheric conditions, and by coming in contact with electric light and trolley wires, may become charged with electricity so as to endanger life and property. And the evidence tended to show that, in the absence of proper appliances and ground connections, a current of electricity may jump from a telephone wire or instrument. In view of these facts, and others that will be herein referred to, it is clear that the business of maintaining and operating a telephone line is one that requires special knowledge and skill in the construction, inspection, and repair of the line and instruments, and in the use of known and approved devices, if any there be, to guard against harmful effects to persons and property from electricity which may be conducted over the line and into the instruments, and the defendant, in engaging in the business, and in contracting to place and maintain its instruments in connection with its wires for the use of its patrons in dwellings and other buildings, in the absence of stipulations to the contrary, is deemed to have undertaken to possess and exercise such knowledge and skill. 10 Am. & Eng. Ency. Law (2d Ed.), 872; Brown v. Illuminating Co. (Md.), 45 Atl. Rep. 182, 46 L. R. A. 745; McKay v. Telephone Co., 111 Ala. 337, 19 South. Rep. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; Griffin v. Light Co., 164 Mass. 492, 41 N. E. Rep. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; Perham v. Electric Co., 33 Oreg. 451, 53 Pac. Rep. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730. Having undertaken to place and maintain the instrument in the house, and connect it with its telephone line for the use of the deceased, in so doing it was under a duty to exercise the care of a prudent man in like circumstances. If, while in the exercise of such care, it had reasonable grounds to apprehend that lightning would be conducted over its wires to and into the house, and there do injury to persons or property, and there were known and approved devices for arresting or dividing such lightning so as to prevent injury therefrom to the house or persons therein, then it was the defendant's duty to exercise due care in selecting, placing and maintaining, in connection with its wires and instruments, such known and approved appliances as were reasonably necessary to guard against accidents that might fairly be expected to occur from lightning when conducted to and into the house over its telephone wires. The questions reserved for consideration are whether the evidence tended to show a neglect of duty on the part of the defendant in these respects; and whether the deceased, while in the exercise of due care on his part, came to his death by reason of such neglect.

The evidence tended to show that at the time Dr. Sawyer was killed one of the defendant's telephone poles was struck by lightning at a point about one-quarter of a mile northeast of Dr. Sawyer's house; that the lightning seemed to spread and go in different directions, the wires being lit up, and seeming to be all ablaze; that this pole was split in two, and several other poles in the immediate vicinity, and in the direction of Dr. Sawyer's house, were injured, and the wire severed; that at a point a mile and a half beyond Dr. Sawyer's house the wire was wound around a lead pipe that was found to be melted, and in the opposite direction from Dr. Sawyer's house, at Putnamsville, traces of electricity were found upon an instrument; that just before the lightning struck the defendant's telephone line Dr. Sawyer was seen sitting in his house, under the telephone instrument, reading from a book; that, just after, his hair was discovered on fire, and red lines were found extending down his neck, chest, and side; that the traces of electricity were found on the carpet, paper, and floor under the chair in which he was sitting; that these were the only marks to indicate that lightning had entered the house; that no device, as a safeguard or protection against electrical disturbances, was attached to or connected with the instrument, except on top, where there was a device, consisting of two metal plates, which, to be complete, should be furnished with a wire attached to one of the plates and running to the ground, and between the two plates was a plug intended to "short current the two plates without entering the bell cell," but, owing to a defect in the construction of the instrument, the plug did not serve the purpose for which it was intended. This testimony tends to show that when the lightning struck the defendant's telephone poles it diffused, and went to earth by telephone poles in the immediate vicinity, and over a wire leading to Putnamsville, and in an opposite direction over a wire to Wheeler's; and that in going to earth by way of Putnamsville a part of the current passed over the wire to and into Dr. Sawyer's house. In the absence of any other strokes of lightning at that time in the vicinity, and of any marks about the house that indicated that lightning had entered it in any other way, the jury could properly infer from the

facts which the evidence tended to show that the lightning which killed Dr. Sawyer came to and entered the house over the defendant's telephone wire. The defendant contends that the force which killed Dr. Sawyer could not have been controlled, diverted, or interrupted by human agency. A determination of this question requires a consideration of the evidence. As we have seen, the evidence tended to show that the lightning struck the defendant's telephone pole a quarter of a mile from Dr. Sawyer's house; that it diffused, and went to earth by several different routes; and that only a small part of that force went to Dr. Sawyer's house. If the jury found as this evidence tended to show, then they were not called upon to find whether any human agency can control the course of a bolt of lightning in its passage from the clouds to the earth. In that event they were only required to find whether the course of such part of a bolt of the lightning as the evidence tended to show went to Dr. Sawyer's house can be controlled when it is upon a telephone wire, and in this connection the question was whether the particular force which the evidence tended to show passed over the defendant's telephone line and killed Dr. Sawyer could, by proper ground connections, and by the use of known and approved appliances, have been controlled or diverted so as to have prevented the injury therefrom. It appears that the telephone wire ran along on Dr. Sawyer's house for some distance before entering the house, and the evidence tended to show that the force which killed Dr. Sawyer passed over this wire into the house without injury to the wire in that vicinity, and without injury to the house. There were no marks to indicate that lightning had entered the house, or that it had been in the immediate vicinity, except the marks on Dr. Sawyer's body and slight marks on the carpet, paper, and floor under the chair in which Dr. Sawyer was sitting at the time of his death. There was evidence tending to show that lightning, when upon a telephone wire, will go to earth on the first ground connection that it comes to; that when such lightning as entered Dr. Sawyer's house, and there killed him, gets upon a telephone line, and passes over the wire without injury to the wire, it may be conducted to earth by known and approved appliances for that purpose, without injury to persons or property; and that, if the defendant's line at Dr. Sawyer's house had been protected by such appliance and had been properly grounded, the force which killed him would have gone to the earth over such ground connection, instead of jumping from the line and passing to earth through Dr. Sawyer's body. In this connection, and by this evidence, issues of fact for the consideration of the jury were presented. It was for them to find what force passed over the defendant's telephone line to Dr. Sawyer's house, and there killed him, and to find the extent of that force. When the jury had found what the force was and its extent, it was for them to say whether there were known and approved appliances for arresting, diverting, and controlling such force so as to prevent injury, and whether the defendant was negligent in not providing such appliances, and whether the deceased came to his death by reason of such neglect.

Upon the question of contributory negligence, the evidence was not so decisive one way or the other as not to leave a reasonable doubt or room for opposing interferences. As we have seen, the character of the business in which the defendant was engaged, and its undertaking to maintain an instrument in Dr. Sawyer's house for his use, were such that it was under a duty to exercise the care of a prudent man in like circumstances in selecting, placing, and maintaining, in connection with its wires and instruments, such known and approved appliances and ground connections as were reasonably necessary to guard against accidents from lightning striking its telephone line and passing along its wires. The evidence tended to show that a telephone line, by the use of known and approved appliances, and by proper ground connections, may be so constructed that the telephone instruments will be comparatively safe; that there were no such appliances or connections at or near Dr. Sawyer's house that were intended, in their then condition, to guard against accidents from such lightning as the evidence tended to show killed Dr. Sawyer; that there was a plug with the instrument, which was intended to be inserted between the plates on the top of the instrument for the purpose of cutting the current of electricity out of the instrument; and that just before Dr. Sawyer was killed his daughter placed this plug between the plates, but there was no ground connection, and the hole under the plates was too small to receive the plug, and, by reason of these defects, it did not serve the purpose for which it was intended. There was also evidence tending to show that the storm came on without much warning. One witness, at least, testified, "It seemed to come up sudden." Upon this evidence it was for the jury to say whether the deceased knew, or ought to have known, that the instrument was not provided with proper appliances and ground connection to guard against injurious effects from lightning when conducted to his house over the defendant's telephone line; whether a prudent man, in like circumstances, would have assumed that the defendant had done its duty in these respects, and omitted to inquire or investigate for himself; whether the deceased knew, or ought to have known, that a storm was approaching; and whether he knew, or ought to have known, of any facts that would have warned a prudent man in like circumstances of approaching danger, and caused him to take measures for his safety by going to some other place, or doing something that was omitted by the deceased. The facts, circumstances, and surroundings which the evidence tended to show were

such that fair-minded men might reasonably draw different conclusions, and were such, when considered in the light of the common and extensive use of telephones, and the manner and place of using them, that a fair-minded man might reasonably say that the deceased, at the time he came to his death, was intently reading in his library, wholly unconscious of the danger to which he was exposed; and that in this he was doing as a prudent man, under like circumstances, would be very likely to do. The question of whether the deceased was in the exercise of due care was for the jury. Judgment affirmed.

NOTE.—*Liability of Telephone Companies for Negligence in the Construction of its Apparatus.*—The law applicable to telegraph and telephone companies in regard to their liability for negligence in the erection and control of their property and of the dangerous element peculiar to their business, is not different from the law applying to other electric companies. In 52 Cent. L. J. 349, an annotation appears, on the subject of What Constitutes Negligence on the Part of Electric Companies in Furnishing Electricity and Providing Apparatus for its Use, which will be found valuable as a strong side light on this subject. In this annotation, however, we shall confine ourselves to the few cases involving the liability of telephone companies in particular, in addition to a few general observations.

As a general rule, persons using electricity must exercise the utmost care to prevent injury, and must protect those possessing less than ordinary knowledge of its character. Giraudi v. Electric Co., 107 Cal. 120. An electric company is bound to exercise the utmost degree of care for the safety of persons liable to come in contact with wires carrying highly dangerous currents. Perham v. Electric Co., 53 Pac. Rep. 14. Where a telephone company permits a wire to become charged from an electric wire and to hang down on to the sidewalk, it is bound to exercise such care as will guard the public against injury from it. Ahern v. Telephone Co., 24 Oreg. 276. A telephone company is only bound to use ordinary care in placing its wires so as to prevent them from coming in contact with uninsulated wires of an electric street railway, and thereby causing injury to individuals. Hand v. Telephone Supply Co. (Pa. 1895), 1 Lack. Leg. N. 351. A telephone company which for several weeks permits its wires to remain suspended across a public highway a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm and is injured by the discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire. Southwestern Tel. Co. v. Robinson, 50 Fed. Rep. 810. Where a telephone company has permission from an electric light company to string its wires along the latter's poles when the telephone company wishes to connect a residence where it has no poles, and the telephone company disconnects a residence, and instead of removing the wire coils it up and hangs it on an electric light pole, the telephone company is bound to look after the wire; and if it fail to do so and the electric light company remove the pole and hang the wire on a telephone pole where it becomes charged with electricity from an electric light wire, and injures a pedestrian on the sidewalk, the negligence of the telephone company is the proximate cause of the accident. Ahern v. Oregon Tel. Co., *supra*. In an action against a telephone company for personal injuries to one who picked up a fallen wire, the question whether the linemen of the telephone company had been reasonably diligent in discovering the fallen wire and in preventing probable injury, the evidence being conflicting, was for the jury. Telephone Co. v. Bennett, 42 Atl. Rep. 759. Where a wire was permitted to remain suspended over a highway in such position that travelers would unavoidably come in contact therewith and be injured, it was held that the wire was the proximate cause of the injury and the company was liable. Southwestern Tel. Co. v. Robinson, *supra*. Where it appeared from the evidence that the lightning striking the flagstaff of one building was communicated by a wire which the telephone company had failed to remove, to another building, setting it on fire and destroying it, it was held that the company was guilty of want of ordinary care and that the wire was the proximate cause of the loss. Jackson v. Telephone Co., 88 Wis. 243. In this case which is quite similar to the facts of the principal case, the court, in speaking of the defense that a stroke of lightning causing damage over the wires of a telephone company is an act of God, made this reply: "The further argument is made that the stroke of lightning was the 'act of God' for which no one is responsible. Certainly a stroke of lightning is an act of God; but that is not the question here presented, or rather another element—*i. e.*, the negligence of men—is added to the question, which materially alters its scope. If I, owning a high mast or building which I know is so situated as to be very likely to be struck by lightning, construct an attractive path for the lightning to my neighbor's roof, so that his house is destroyed by a bolt which strikes my mast or building, shall I escape liability for my negligence or wrongful act by pleading that the lightning was the act of God? Certainly not. I invited the stroke of one of the most destructive powers of nature and negligently turned its course to my neighbor's property."

CORRESPONDENCE.

PARDONING POWER OF THE EXECUTIVE.

To the Editor of the Central Law Journal:

There is a popular disposition to accept a pardon from a governor of a State as final and conclusive as to the release and legal reinstatement of one convicted of crime. The consideration of a charter of pardon is made up of the representations and reasons offered to the executive to obtain clemency. If the executive relies on such representations and reasons, and they are false and made in fraud or falsehood to obtain the pardon, the instrument is void. The principle of law is not a new one nor has it received any very modern construction. It is one on which the dust of time has fallen, and the popularly accepted idea of the absolutism of pardon has, to a more or less extent, buried the force of the truth concerning the pardoning power of a governor. The pardoning power is an executive heritage, coming to the governors of the American States with the system of law derived from English jurisprudence. Under the federal and State constitutions, the pardoning power of the executive is similar in extent and character to that of England's ruler. Chief Justice Marshall, in United States v. Wilson, 7 Pet. 159, said: "As this power has been exercised from time immemorial, by the executive of that nation whose

language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon."

In *Ex parte* Wells, the Supreme Court of the United States reaffirmed and definitely established this view of the subject. In the case of People v. Bowen, 43 Cal. 439, the Supreme Court of California recognized this rule as to the pardoning power of an executive held by the highest court of the nation, and the California court applied it to the jurisprudence of the State. In the Bowen case just mentioned, the court said: "In *Ex parte* Wells, 18 How. 310, the Supreme Court of the United States reaffirmed this view of the nature of the executive power to pardon offenses as existing under the federal constitution, and there can be no doubt that the pardoning power, whether exercised under a federal or State constitution, is the same in its nature and effect as that exercised by the representatives of the English crown in this country in colonial times." Bishop, in Bishop's New Criminal Law, vol. 1, sec. 902, says: "The common law of crimes, we have seen, prevails generally in our States, and in the exceptional States the rules of the common law regulate a conferred jurisdiction; so that the English authorities on pardon are pertinent with us. Though our United States tribunals do not punish an offense without the aid of a statute, having acquired the statutory power, they too look into the common law for their rules of decision. On the question of pardon, the course was early explained by Marshall, C. J., thus: 'As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.'"

It is a clearly recognized fact that the executive pardoning power in the States comes through the common law and must be exercised under, and controlled by, the principles which we have inherited from the English system of laws. If the law applicable to pardons comes from the common law, and English system, and must be exercised under such law and such system, we are able to see the bearing of English and common law authorities upon the subject. Blackstone, in his Commentaries, vol. 4, page 400, says: "Next, it is a general rule that wherever it may be reasonably presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed." Other writers upon the common law are in thorough harmony with this doctrine and are supported by the English courts. Bishop, as an American writer upon criminal law, in Bishop's New Criminal Law, vol. 1, sec. 905, sets out the principles quoted above from Blackstone as applicable to English law, and in the immediately following section says, with regard to the rule in America:

'Extent of Fraud. According to the English books, the pardon is void whenever the king has not been truly and fully apprised of the nature of the case and the state of the proceedings. In the words of a writer on the subject, 'any suppression of truth or suggestion of falsehood, in a charter of pardon, will vitiate it.' · · · With us similar rules as to the quantity of fraud appears. If, for example, on comparing the instrument of pardon with the record in the cause, the court sees that the executive may have been imposed upon by false statements, or an omission of relevant facts, it will hold the pardon void. Even though the pardoned person did not himself participate in the deception, the pardon is equally null if others procured it by false papers and representations. 'He can claim nothing as a favor that is founded on the fraud of his friends, so as to prevent the frustration of the fraud.'"

This authority from Bishop is consistently supported by the American cases, and they show conclusively that where the executive grants a pardon upon false premises and fraudulent representations such pardon is void and inoperative.

In Commonwealth v. Halloway, 44 Pa. St. Rep. 200, the Supreme Court of Pennsylvania, in considering the pardon obtained by false representations and false papers, said: "We think also that this pardon is void because of the false and forged representations and papers that were used in procuring it from the governor."

This Halloway case, in many of its parts, elaborates this rule. It is upon the common law, and its special doctrine upon this subject, that the Pennsylvania court proceeds, although Pennsylvania at the time of the trial of the Halloway case had a specific statute relating to pardons. There are four other cases, respectively from the courts of Indiana, Georgia, Pennsylvania and Texas, which hold with the Halloway case, above mentioned, to the effect that falsehood and fraud, as the basis of a charter of pardon, vitiate and nullify the pardon. These are the cases of State v. Leak, 5 Ind. 359; Dominick v. Bowdoin, 44 Ga. 357; Com. v. Kelly, 9 Phila. 586; Rosson v. Stehr, 23 Tex. App. 287. In the Leak case above mentioned, the Indiana court held that where it may reasonably be inferred from the language of a pardon, considered in connection with the record of the cause in which it was granted, that the executive was deceived, misled or imposed upon by false statements or omissions as to relevant facts the pardon is void. The constitutions or statutes of many States require the governor to file his reasons for granting a pardon. The constitution of Kentucky (sec. 77), compels the filing of such reason. The representations made to the governor as an inducement to secure clemency are the foundations on which he rests his act. When these foundations are tainted with fraud or falsehood they void the charter of pardon.

W. W. DAVIES.

BOOK REVIEWS.

THE LAW OF REAL PROPERTY, Second Edition, 3 Volumes.

This is one of what the publishers call their practitioners' series, and very properly so called, as they are very handy and useful to the practicing lawyer. The author in this work has offered to the profession a treatise on the law of real property as the law on this subject exists to-day, divested of all obsolete doctrines in a form readily accessible and free from faultless disquisitions. The work is not a digest, nor perhaps, strictly speaking, a treatise, but a plain embodiment of the law on this subject prepared after the same plan as the author's previous work on the law of corporations. The author says he has in this edition retained under original section numbers nearly the whole of the text of the first edition, but

in many cases additional has been added thereto together with recent accumulative authorities. New sections have also been added embodying the rules and principles announced in the latest adjudications of the courts down to date. Among the subjects which have been enlarged in the present edition are community property, eminent domain, fixtures, homestead rights, trust property and water rights. The first two volumes treat of the principles of law relating to interests in land, while the third volume is devoted principally to the legal rights and duties of landowners in respect of their lands, treating of the remedies which the law affords for the protection and enforcement of landowners' rights discussed under the headings of trespass, ejectment, forcible entry and detainer, partition, quieting title, nuisance, dower, and waste. The citations of authorities are very numerous in proportion to the text which adds to its usefulness to the practitioner. The usefulness of these handy little volumes cannot be over estimated. The author is Charles T. Boone. The three volumes 18mo. are handsomely bound in best law sheep. Published by Bancroft-Whitney Company, San Francisco.

PROBATE REPORTS ANNOTATED.

Volume 5 of this very welcome series of reports has just been received from the publishers. Nothing can be more useful to the lawyer who has litigation in the probate court than these reports. The opinions of the various courts of last resort, selected by the editor out of the numerous probate cases decided are well termed leading cases. The long intervals between the issue of these volumes show that the editor has not cumbered them with useless material in order to make their appearance frequent in an effort to make more business for editor and publisher. The present volume contains 90 cases, 30 of them with editorial notes. Volume 4 was issued one year ago, and volume 3 about two years ago. The editorial notes have evidently been prepared with much care and completeness. We observe two very interesting notes, one on the subject of delusions, attached to case of Medill v. Snyder, Supreme Court of Kansas, and another on transactions between trustee and *cestui que trust*, attached to case of Adams v. Cowen, Supreme Court of the United States. The editor is George A. Clement of the New York Bar, author of Clements' Digest of Fire Insurance Decisions. The volume contains 810 pages handsomely bound in best law sheep. Published by Baker, Voorhis & Co., 66 Nassau Street, N. Y.

WEEKLY DIGEST

1. ADMINISTRATION—Banks — Joint Deposit — Joint Property of Husband and Wife.—A husband deposited money in a bank, and took the certificate in the name of himself and wife. The wife testified, in a suit against the executor of the husband, that she had bought a portion of the farm 25 years before; and the executor, who was the son of deceased, testified that the money deposited was earned on the farm. Held, not to show that the money was not jointly owned by the husband and wife, as indicated by the joint certificate.—IN RE BROWN'S ESTATE, Iowa, 85 N. W. Rep. 617.

2. ADVERSE POSSESSION—Color of Title.—All the incidents mentioned in the statute, conferring title by five years' adverse possession under a registered deed and payment of taxes, must concur and be continued for the time prescribed in order to complete the title under the statute.—GILLUM v. FUQUA, Tex., 61 S. W. Rep. 988.

3. APPEAL—Antedating Bond.—Under Sayles' Civ. St., art. 1670, requiring the party appealing to file a bond within ten days from judgment, a bond filed after 10 days does not gave the appellate court jurisdiction, though it is dated back as within 10 days by consent.—MCMAHON v. CITY BANK OF SHERMAN, Tex., 61 S. W. Rep. 952.

4. APPEAL—Transcript — Clerk's Seal. — Where the seal of the clerk is not in fact affixed to the transcript no appeal, no question is presented, and the appeal will be dismissed, though the certificate states that the seal is affixed.—CONRAD SEIPP BREWING CO. v. WOOLMAN, Ind., 59 N. E. Rep. 1087.

5. BILLS AND NOTES—Consideration — Gambling Apparatus.—Under Burns' Rev. St. 1894, § 2181, prohibiting the keeping of any gambling apparatus for the purpose of gaming, the answer in a suit on notes, setting up that the consideration therefor was a slot machine, which could be used for no other purpose but gambling, was not demurrable.—BARNHART v. GOLDSTEIN, Ind., 59 N. E. Rep. 1066.

6. CARRIERS—Ejecting Passengers—Damages. — One carelessly entering a train, which he should have known did not stop at his destination, but which he hoped would stop either there or near there, and who has a ticket to such destination, which he offers to the conductor, is a passenger, within Sand. & H. Dig. § 6192, providing that if any passenger shall refuse to pay his fare the conductor may put him out of the cars at any "usual stopping place" he shall select, and is entitled to damages where he is ejected for non-payment of fare at a place other than a usual stopping place.—ST. LOUIS S. W. RY. CO. v. HARPER, Ark., 61 S. W. Rep. 911.

7. CONSTITUTIONAL LAW—Statute — Inherent Power of Legislature.—The framers of the fundamental law of this State must be presumed to have had knowledge of the fact, because a matter of current history, that many municipalities of the proposed State were already indebted in excess of the 4 per cent. limit mentioned in section 4, art. 14, Const., and yet had an entirely inadequate supply of water, light, and sewer facilities.—PEOPLE v. CITY COUNCIL OF SALT LAKE CITY, Utah, 64 Pac. Rep. 460.

8. CONTRACT—Bond— Rights of Material-Men. — A party furnishing materials to one who has contracted to erect and deliver a lighting plant to a city free and clear of all claims or liens for labor or material has no claim that can be enforced against the plant, and cannot sue on the bond given by the contractor for the faithful performance of his contract with the city, when it is clear that the bond was taken for the city's benefit, without any intent to secure the material-men or laborers.—ELECTRIC APPLIANCE CO. v. UNITED STATES FIDELITY & GUARANTY CO., Wis., 85 N. W. Rep. 648.

9. CONTRACTS—Conditions Precedent — Pleadings.—

Where a complaint alleges a written contract with defendant containing certain specified conditions, plaintiff's performance of the conditions and defendant's default, the written agreement is admissible in evidence, though it contain conditions not alleged, but not inconsistent with the allegations,over defendant's objection that it is not in accordance with the complaint, and at variance therewith, since such additional conditions do not constitute a variance, but should be disregarded.—BOWERS' CALIFORNIA DREDGING CO. v. SAN FRANCISCO BRIDGE CO., Cal., 64 Pac. Rep. 475.

10. CONTRACTS—Interpretation—Usage.—In a suit on a grading contract, stipulating a certain price per cubic yard, "straight cut and fill," where the dispute was as to whether, by usage, the expression, "straight cut and fill," contemplated payment for material taken from cuts, and another payment for the same material placed in fills, or but one payment for one handling of material, evidence to show that it was customary for railroads in that locality to make contracts providing for but one payment, where the same material taken from cuts was used in fills, was irrelevant, since the evidence did not relate to the meaning of the the term "straight cut and fill," but to the general custom of drawing contracts, which was not in issue.—ADRICH v. COLUMBIA SOUTHERN RY. CO., Oreg., 64 Pac. Rep. 454.

11. CONTRACTS—Performance. — Defendant engaged plaintiff to place a building on piles, so that it might be used for a boathouse, and instructed plaintiff to place the building in line with a certain dock. Plaintiff placed the house otherwise, and testified that H, who claimed to represent defendant, instructed him to place the house as he did. H testified he repeatedly told plaintiff defendant wanted the house in line with the dock, and it was not shown that H had any authority to change the contract, though it appeared he had acted for defendant on some matters. Held, that plaintiff had departed from the contract without justifiable excuse, and could not recover thereunder. —HOULAHAN v. CLARK, Wis., 85 N. W. Rep. 676.

12. CONTRACT — Unambiguous Written Contract — Parol Evidence.—Where a written contract was not ambiguous, evidence of the circumstances and facts leading up to its consummation was not admissible to enable the court to construe it.—JOHNSON v. PUGH, Wis., 85 N. W. Rep. 641.

13. CORPORATIONS—Directors—Contract—Validity.—Where directors of a corporation purchased property by an agreement in writing binding themselves to convey such property within five days to the corporation, and openly stated that they expected and intended to so convey it, they did not thereby become trustees of the property for the benefit of the company and its stockholders.—MACKEY v. BURNS, Colo., 64 Pac. Rep. 485.

14. CORPORATION—Dissolution—Decree.—Where the court has decreed the dissolution of a corporation, and the appointment of a receiver, and the corporation appeals from the portion of the decree appointing a receiver, but not from that ordering dissolution, its acquiescence in the decree of dissolution terminates its existence so that it has no capacity to prosecute an appeal from the other provisions of the decree, and such appeal will be dismissed.—STATE v. FIDELITY LOAN & TRUST CO., Iowa, 85 N. W. Rep. 636.

15. CORPORATIONS—Failure to Make Annual Reports. —The cause of action given by Burns' Rev. St. 1894, §§ 5071, 5073, requiring corporations to make and publish an annual statement of their financial condition, and providing that, if no report is made, any person damaged by the failure to make a report can recover, from the officers failing to make the report, for all damages resulting from such failure, is not an action to recover a penalty, and hence the two years statute of limitations is not a bar thereto.—ST. JOHN v. STAFFORD, Ind., 59 N. E. Rep. 1075.

16. CORPORATIONS—Insolvency—Stock Subscriptions —Receiver.—Where a complaint by a receiver of an insolvent corporation alleged that the corporation was insolvent, and that plaintiff was appointed receiver, and that there were no assets except unpaid subscriptions, which were inadequate to pay the indebtedness of the company, it was competent for the court to direct the receiver to sue the delinquent stockholders without requiring an assessment and demand for payment.—CARNAHAN v. CAMPBELL, Ind., 59 N. E. Rep. 1064.

17. CREDITORS' SUIT—Evidence.—Where a judgment debtor and a third person contracted to rent certain land and to raise a crop thereon, one-half of the crop to belong to the landlord, and the balance to be divided equally between the debtor and such third party, and the agreement was carried out in good faith, each party thereto performing half the labor of raising the crops, such third party is entitled to a one-fourth share of the crop as against the creditor of the judgment debtor.—BOURNE v. DARDEN, Tenn., 61 S. W. Rep. 1079.

18. CRIMINAL EVIDENCE—Confession—Presumption. —The question whether a confession has been made with that degree of freedom which justifies its admission in evidence is for the court, but when there is a conflict in the evidence as to whether it was made voluntarily, and the court is in doubt, the question should be left to the jury.—STATE v. STORMS, Iowa, 85 N. W. Rep. 610.

19. CRIMINAL EVIDENCE — Declaractions of Third Persons.—Where the defendant, in a prosecution for abortion, denies his guilt, and contends that A is the guilty party, it is error to allow the latter to testify for the State, on rebuttal, as to a conversation, not in the presence of defendant, in which the witness had stated as to his knowledge of the abortion, though the person with whom such conversation was had testified thereto as a witness for the State on his direct and cross-examination.—STATE v. LEE, Iowa, 85 N. W. Rep. 619.

20. CRIMINAL EVIDENCE—Threats by Deceased.—On a prosecution for murder, where the defense was justifiable homicide, it was error for the court to exclude evidence of threats and former assaults made by deceased on the defendant.—BELL v. STATE, Ark., 61 S. W. Rep. 918.

21. CRIMINAL LAW—Cumulative Sentences—Validity. —Pen. Code, § 105, providing that every prisoner confined in the State's prison for a term less than for life, who escapes therefrom, shall be punishable by imprisonment for a term equal in length to the term he was serving at the time of such escape, the second term of imprisonment to commence from the time he would otherwise have been discharged, being limited to escapes, does not warrant imposing a cumulative sentence on defendant for burglary after a sentence had already been pronounced on him under a former conviction for an assault to commit murder.—EX PARTE MORTON, Cal., 64 Pac. Rep. 469.

22. CRIMINAL LAW — Embezzlement — Salesman—Venue.—Where a salesman, required to collect for articles sold, and report such sales to and make settlements with the office of his employer, in P county, made sales in other counties, collected the price, and, without reporting it, converted the money, in a prosecution for embezzlement in P county it was error to direct a verdict of not guilty on the ground that, the offense having been committed in another county, the court had no jurisdiction, since, as defendant's obligation was to account to his employer in P county, the venue was properly laid there.—STATE v. MAXWELL, Iowa, 85 N. W. Rep. 613.

23. CRIMINAL LAW—Homicide — Drunkenness.—Under Pen. Code, § 22, providing that no act committed by a person while in a state of voluntary intoxication is less criminal therefor, but whenever the actual existence of any particular motive is a necessary ele-

ment to constitute any particular degree of crime the jury may consider the fact that accused was drunk at the time, it is proper to charge in a trial for murder that evidence of drunkenness can only be considered for the purpose of determining the degree of crime.—PEOPLE v. METHEVER, Cal., 64 Pac. Rep. 481.

24. CRIMINAL LAW—Indictment—Venue of Offense.—The venue of an offense which is triable in either of two counties, as provided by Code, § 5158, because committed within 500 yards of the boundary line between them, is not sufficiently laid by an averment that it was committed in the county where the indictment was found, or in another county within 500 yards of the boundary line between the two counties, "as near as the grand jury knew and can state."—STATE v. DAILY, Iowa, 85 N. W. Rep. 629.

25. CRIMINAL LAW—Insanity as Ground for Not Pronouncing Judgment.—Under a statute providing that one convicted of a crime may show his insanity as a reason why judgment should not be pronounced against him, and requiring the court, if it is of the opinion that there is reasonable ground for believing that the accused is insane, to impanel a jury to determine the question, such insanity may be shown orally, and without any formal plea.—STATE v. HELM, Ark., 61 S. W. Rep. 915.

26. DEEDS—Delivery—Evidence.—One against whom there were judgments induced his mother to execute a deed of her land to his wife, in order that with the aid of the title he might procure a loan. It was agreed that the deed should not be recorded until necessary, and that if no loan were made it should be returned. After the mother had executed the deed, the wife took it from where it lay on a secretary, and put it in a box accessible to both the husband and wife, in which were other papers of the husband, where it remained some months, when the wife surreptitiously abstracted it and recorded it. Held, that the wife took no title, there having been no delivery.—BARNS v. BARNS, Iowa, 85 N. W. Rep. 629.

27. DEEDS—Presumptions.—After the death of the parties to a deed absolute in form, and the lapse of nearly 60 years, presumption in derogation of legal title conveyed thereby cannot be indulged.—LAGUERENNE v. FARRAR, Tex., 61 S. W. Rep. 953.

28. DEEDS—Trusts — Remainder — Contingency.—A deed conveyed land to the grantor's "wife and her children forever, to hold together with all its rents, issues, and profits, but during her natural life to her sole use," reserving to the grantor the use during his life, with remainder after the death of the grantor and his wife to the wife's children in fee-simple forever, but, in default of such children or descendants of such children then "living or *in esse*," then the property to descend to designated persons. Held, that the wife took a life estate, with contingent remainder to her children, with limitation over to the persons designated, and the wife's children *in esse* did not acquire a vested remainder.—BENSON v. EDWARDS, Tenn., 61 S. W. Rep. 1084.

29. DIVORCE—Antenuptial Incontinence.—A divorce will not be granted for antenuptial incontinence.—GRIGGS v. GRIGGS, Tex., 61 S. W. Rep. 941.

30. ELECTIONS—Ballots — Preservation.—The objection that ballots cast at a general election, and required by Code, § 1142, to be preserved by the county auditor, are not admissible in an election contest, because not shown to have been properly preserved, may be urged, though the incompetency of such ballots is not alleged in the pleadings.—DE LONG v. BROWN, Iowa, 85 N. W. Rep. 624.

31. ELECTIONS — County Offices — Vacancies.—Acts 1897 (St. 1897, p. 474), § 58, provides that all elective county officers shall be elected at the general election at which the governor is elected, and shall take office in January next succeeding their election. Section 25, subd. 19, authorizes the board of supervisors to fill by appointment all vacancies that may occur in any elective county office; the appointee to hold office for the unexpired term, or until the next general election. Held, that the words "next general election" mean the next general election for the particular office so filled by appointment, and one appointed by the board of supervisors to fill a vacancy in the office of county auditor is entitled to that office till the next gubernatorial election.—PEOPLE v. COL, Cal., 64 Pac. Rep. 447.

32. EMINENT DOMAIN—Condemnation—Description—Monuments.—Where the alleged monuments in the description of a highway contained in the order laying out the highway could not be located by the order, but only by resort to the original survey, they were not monuments, within the meaning of the rule that, in case of ambiguity, courses and distances must yield to monuments, and therefore they could not be used to cure alleged ambiguities in the order.—BLAIR v. MILWAUKEE LIGHT, HEAT & TRACTION CO., Wis., 85 N. W. Rep. 675.

33. EVIDENCE — Deeds — Photographic Copies.—To permit a party to introduce photographs of the same size as a deed the genuineness of which is in issue is error when the original is in evidence, but the introduction of photographs which are so enlarged as to make the proportions plainer for the purpose of illustrating the testimony of experts is not error.—HOWARD v. ILLINOIS TRUST & SAVINGS BANK, Ill., 59 N. E. Rep. 1106.

34. FRAUDULENT CONVEYANCES—Burden of Proof.—Where a creditor levies on land conveyed by his debtor to his wife, on the ground that the conveyance is fraudulent, in a suit by the wife to enjoin sale under the execution the burden is on defendant to show want of consideration and fraud.—MEREDITH v. SCHAAF, Iowa, 85 N. W. Rep. 628.

35. FRAUDULENT CONVEYANCES—Chattel Mortgage—Secret Agreement.—A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors. A chattel mortgage which authorizes the mortgagor to control the mortgaged property and to sell it in the regular course of business is void on its face.—MOORE v. WOOD, Tenn., 61 S. W. Rep. 1063.

36. FRAUDULENT CONVEYANCE — Conveyances in Fraud of Marital Rights.—A conveyance of land or personalty by a husband during his last sickness, and in contemplation of death, without consideration, and for the purpose of defrauding his wife of her marital rights, gives ground for equitable interference.—NEWTON v. NEWTON, Mo., 61 S. W. Rep. 881.

37. FRAUDULENT CONVEYANCE—Preference—Fraudulent Intent of Grantor.—Where suit is brought to set aside a conveyance by an insolvent debtor to a creditor, the burden of showing the good faith of the transaction is not on the latter, though the debtor is shown to have intended to hinder and delay his other creditors, but the creditor attacking the conveyance must show its fraudulent character.—WALL v. BEEDY, Mo., 61 S. W. Rep. 864.

38. GAMING — Gambling Agreement — Illegality.—Plaintiff worked in defendant's lumber camp, and played poker in defendant's supply store. There was no money in the camp, and defendant, by its storekeeper, who was also timekeeper and bookkeeper, agreed to let the winners have goods out of the store equal to the amount of their winnings, and charge the same to the losers. Held, that defendant was not entitled to set off the amount so charged to plaintiff against his claim for wages, since the arrangement was illegal, as contrary to the statute, and opposed to public policy.—OLSON v. SAWYER-GOODMAN CO., Wis., 85 N. W. Rep. 640.

39. GUARDIAN AND WARD — Life Insurance —Certificate.—Where an applicant for insurance in a life association declared his wish that it should be for the benefit of his "estate," but the association issued,

and he accepted, a certificate which promised that the association would pay "the family," the contract was expressed by the certificate, and not by the application; and, the money having been received by the executrix, who was also guardian of the minors of the family, she was liable to them therefor.—HUTSON v. JENSON, Wis., 85 N. W. Rep. 690.

40. HUSBAND AND WIFE—Antenuptial Agreement—Consideration.—An antenuptial agreement that the survivor should take no share of the estate of the deceased, on the contract being reduced to writing after marriage, is valid; the agreement to marry being consideration.—MOORE v. HARRISON, Ind., 59 N. E. Rep. 1077.

41. INFANTS—Torts.—Where, after a minor has been duly served with process, he appears in person and by counsel, files an answer, goes to trial, and awaits the result of the verdict, without setting up his infancy as a defense, he cannot then interpose his minority, and the fact that no guardian *ad litem* had been appointed, as a ground for setting aside the verdict.—WATSON v. WRIGHTSMAN, Ind., 59 N. E. Rep. 1064.

42. INJUNCTION—Bond—Damages—Attorney's Fees.—Attorney's fees are allowable as damages in an action on an injunction bond.—BINFORD v. GRIMES, Ind., 59 N. E. Rep. 1085.

43. INSURANCE—Inventory—Invoices—Performance.—A stock of goods covered by a fire policy was replenished from time to time by shipments from another store belonging to the insured, who kept a duplicate of the invoices of the goods so shipped, with a description of the same and their value. Held, that on destruction of the stock by fire the furnishing of the invoices to the insurer was not a compliance with a clause of the policy requiring an inventory to be taken.—FIRE ASSN. OF PHILADELPHIA v. MASTERSON, Tex., 61 S. W. Rep. 962.

44. JUDGMENT—Execution—Barred by Lapse of Time.—In determining whether the right to an execution on a judgment is barred by the 15-years statute of limitations, the time of defendant's absence from the State since the last execution was issued is to be deducted, as is done in determining whether an action to enforce the judgment is barred.—BRITTAIN v. LANKFORD, Ky., 61 S. W. Rep. 1000.

45. JUDGMENT—Vacation after Term.—The court has no jurisdiction to vacate a judgment on a motion made after the term at which it was entered.—IN RE ZECKENDORF'S ESTATE, Ariz., 64 Pac. Rep. 492.

46. LIBEL — Privileges — Report of Legislative Proceedings.—Under Code Civ. Proc. § 1907, providing that an action cannot be maintained against the proprietor of a newspaper for the publication of a fair and true report of legislative proceedings, without proof of actual malice, it is error, in an action against a proprietor of a newspaper for the publication of alleged libelous imputations on the plaintiff's action as a member of the legislature, to refuse to instruct that if the jury found that the publication complained of was a fair and true report of the legislative proceeding, and that it was published without malice, they should find for the defendant.—GARBY v. BENNETT, N. Y., 59 N. E. Rep. 1117.

47. MANDAMUS—Changing Names of Counties—Const., art. 5, § 26, prohibiting the legislature to pass local or special laws changing the name of persons or "places" applies to changing the names of counties, notwithstanding article 6, § 4, and article 16, §§ 1, 3, recognize the power of the legislature to create new counties and to change those already established.—STATE v. THOMAS, Mont., 64 Pac. Rep. 503.

48. MARRIAGE—Breach of Marriage Promise—Incapacity of Parties.—Where the defendant in an action for breach of marriage contract pleads the physical condition of the plaintiff as tending to show that the alleged contract was not made, and not to excuse performance, it cannot be considered for the latter purpose.—VIERLING v. BINDER, Iowa, 85 N. W. Rep. 621.

49. MASTER AND SERVANT—Appliances—Fellow Servants.—Where a number of safe appliances adapted for the work are within reach of an experienced servant, the selection of the particular appliance to be used is no part of the master's duty. If a servant is injured by the breaking of a chain designed for his permanent use in hoisting goods, in consequence of a fellow-servant's negligence in using old instead of new iron in replacing a link, the master is liable for the injury, though the proximate cause thereof was the negligence of the fellow-servant in making the link, since, as the chain was a permanent appliance, the master was bound to see that it was safe, as well as to furnish proper material and a competent smith to make it.—HASKELL v. CAPE ANN ANCHOR WORKS, Mass., 59 N. E. Rep. 1113.

50. MASTER AND SERVANT—Negligence—Assumption of Risk.—The presence of ice and snow on a car at the time it was being iced by a servant of an ice company was a danger which was obvious, and which the servant assumed, and hence he was not entitled to recover from the railroad company for injuries sustained by slipping, caused by such ice and snow.—BAKER v. LOUISVILLE & N. TERMINAL CO., Tenn., 61 S. W. Rep. 1029.

51. MASTER AND SERVANT — Negligence — Obvious Danger.—Where defendant's agent requested plaintiff, who was a boy 15 years old, of ordinary health and intelligence, to assist him in putting trucks under a binder, and plaintiff was injured by defendant's agent negligently allowing the binder to tip over while plaintiff was so employed, there was no such serious danger and hazard, not obvious to a boy of plaintiff's age, that the failure of the agent to warn plaintiff constituted negligence on the part of defendant.—WAGNER v. PLANO MFG. CO., Wis., 85 N. W. Rep. 043.

52. MASTER AND SERVANT—Vice-Principal—Instructions.—An instruction in a personal injury case that the employer is answerable to all the underservants for the negligence of a vice-principal, either in his personal conduct within the scope of his employment or in his selection of other servants, is faulty, as failing to distinguish between acts done in the performance of the master's duty to the servant, and acts done in discharge of a duty which the master might properly commit to another without liability for negligence; the employer being liable for the negligence of a vice-principal only when the latter is engaged in the performance of some of the employer's personal duties.—SCOTT v. CHICAGO G. W. RY. CO., Iowa, 85 N. W. Rep. 631.

53. MECHANICS' LIENS — Subcontractors — Claim for Lien—Notice.—Under Rev. Stat. 1898, § 3315, giving a subcontractor a mechanics' lien provided he gives written notice to the owner of the property of his intention to claim a lien, and section 3220, providing that a claim for a mechanic's lien shall state all the "material facts in relation thereto," a claim for a lien by subcontractors which fails to state to whom the original contract for the construction of the building was made, and to allege that the claimants have given notice in writing to the owner of the property affected, fails to state "all the material facts."—SCOTT v. CHRISTIANSON, Wis., 85 N. W. Rep. 658.

54. MORTGAGE—Purchase of Tax Liens.—If a mortgagee of real estate, in order to protect his interest therein, pays or purchases tax claims thereon, the *status* of such claims, as tax liens, is thereby extinguished, but there is created, by force of the statute, a lien, in favor of the payor, upon the realty, for the amount of his expenditures and interest, secured by the mortgage, of as high grade as the original mortgage lien.—ENDRESS v. SHOVE, Wis., 85 N. W. Rep. 658.

55. MORTGAGES—Recitals—Estoppel.—The warranty clause of a mortgage recited that a portion of the land had been conveyed to A as trustee to secure a debt, and another portion to B as trustee to secure a debt, but that the reference to the B trust deed was not in.

tended to estop the mortgagees from contesting the validity of the B trust deed if they should so desire, and that the only object of such recital was to give notice to the mortgagees of the existence of the A and B trust deeds. Held, that the only object of the mortgagors in making the recital was to protect themselves in their warranty, and, the A trust deed being defectively acknowledged, the mortgagees could take the advantage of such fact.—ALLEN WEST COMMISSION CO. v. BROWN, Ark., 61 S. W. Rep. 913.

56. MUNICIPAL CORPORATIONS — Bonds—Street Improvements.—Under Burns' Rev. St. 1894, §§ 4288-4294, authorizing cities to issue street improvement bonds, and providing that the property owners may pay their assessments in installments on the execution of a written agreement that all irregularities and illegalities in the making of the assessments were waived, and a promise to pay all assessments against their property, the holders of such bonds were entitled to a personal judgment against property owners, having executed the agreement, for the amount of their assessments remaining unpaid after the sale of the property on the foreclosure of the liens for the work. —WAYNE CO. SAV. BANK v. GAS CITY LAND CO., Ind., 59 N. E. Rep. 1048.

57. MUNICIPAL CORPORATIONS — Contracts—Counterclaim.—Where for several years a city paid a water company the hydrant rentals due under the contract, and made no complaint as to the character of the service rendered by the company, in an action by the company for hydrant rentals, the city was not entitled to recover by way of counterclaim for insufficient service at fires; the city's conduct having amounted to a waiver of any such counterclaim.—MONROE WATERWORKS CO. v. CITY OF MONROE, Wis., 85 N. W. Rep. 685.

58. MUNICIPAL CORPORATIONS—Defective Brick Sidewalk.—Where a brick sidewalk had been out of repair for a month, and loose bricks existed, some of which were three or four inches below the level of others, some standing up edgeways on top of others, and some entirely gone, and, on a dark night, plaintiff, who did not know the condition of the wall, fell thereon at a place where there was no street lamp, and was injured, there was sufficient evidence to warrant a verdict against defendant on the ground that plaintiff, without contributory negligence, was injured by negligence of the city.—CITY OF TERRE HAUTE v. CONSTANS, Ind., 59 N. E. Rep. 1078.

59. MUNICIPAL CORPORATIONS—Defective Sidewalk—Negligence.—In a suit for injuries received by falling on a defective sidewalk, it was not error to admit expert testimony as to the probability of such a fall causing certain injuries, and whether such injuries were likely to be permanent, where the court charged that, if the evidence satisfied the jury to a "reasonable certainty," the plaintiff was entitled to recover, and that they might consider what amount of suffering it was "reasonably certain" would result from the injury, in fixing damages.—VIELLESSE v. CITY OF GREEN BAY, Wis., 85 N. W. Rep. 665.

60. MUNICIPAL CORPORATIONS — Injuries on Slippery Sidewalk.—Smooth and slippery ice covering a sidewalk for a space of 15 feet, which formed from water running off the roof of an abutting building on account of a leak in a water pipe thereon, is a dangerous obstacle, which the city is bound to remove within a reasonable time after notice, where there is no other ice or snow on the streets, since it was possible and practicable for the city to remove the same. —REEDY v. ST. LOUIS BREWING ASSN., Mo., 61 S. W. Rep. 859.

61. MUNICIPAL CORPORATIONS — Navigable Stream—Pollution — Injunction.—In an action by a riparian owner to enjoin a city from emptying its sewage into a navigable stream, evidence that the sewage could be deodorized at a small expense was properly admitted as bearing on plaintiff's right to relief by injunction.—WINCHELL v. CITY OF WAUKESHA, Wis., 85 N. W. Rep. 668.

62. MUNICIPAL CORPORATIONS—Negligence—Death of Horse—Fright.—Where the negligent operation of a street roller frightens a horse, and causes it to rupture a blood vessel in its heart, which results in death, there can be no recovery therefor from the city.—LEE v. CITY OF BURLINGTON, Iowa, 85 N. W. Rep. 618.

63. MUNICIPAL CORPORATIONS — Waterworks—Negligence.—A municipal corporation, owning and operating a system of waterworks erected by taxation and maintained by tolls and rents, is not liable to a patron of the waterworks, paying the usual rents, for the value of his property destroyed by fire, through the negligent failure of the city to furnish the water necessary to extinguish the fire.—BUTTERWORTH v. CITY OF HENRIETTA, Tex., 61 S. W. Rep. 975.

64. PARTITION — Decree — Estoppel.—Where certain parties to a decree of partition took possession of the property allotted to them in trespass to try title by the parties against one claiming under a deed of the guardian, they could not be heard to say that the decree of partition was void for insufficiency of description of the allotments.—TAFFINDER v. MERRILL, Tex., 61 S. W. Rep. 936.

65. PARTNERSHIP — Indebtedness—Contract—Consideration.—Where defendant in an action on a partnership account answered that he had sold his interest to his partner on consideration that the partner assume the indebtedness, and that as a further consideration the plaintiffs had agreed to release defendant, and accept the partner in his stead, such agreement for release was based on a sufficient consideration, which may consist of something merely detrimental to the promisee.—JONES v. AUSTIN, Ind., 59 N. E. Rep. 1052.

66. PLEADING — Counterclaim — Replication.—In a suit on a note, defendant set up as a counterclaim the amount taxed by the court for his legal services on a mortgage foreclosure. Plaintiff's replication alleged that it had been agreed between them that whenever, on a foreclosure sale, plaintiff purchased the property, defendant should receive one-half of the attorney's fee as taxed by the court, and that the other half should go to the plaintiff; that plaintiff had purchased under the foreclosure in question; and that one-half of the fee allowed had been credited on the note. Held, that it was error to strike that part of plaintiff's replication relative to the agreement, on the ground that it was against public policy, since if the contract was immoral, and had been executed, the plaintiff had a right to show the facts in defense of the counterclaim.—MURRAY v. HALDORN, Mont., 64 Pac. Rep. 511.

67. PROCESS—Summons — Service.—Under Rev. St. 1898, § 2636, subd. 4, providing that a summons may be served on a defendant who is not found by leaving a copy at his usual place of abode in the presence of some one of the family, it was not sufficient to serve a summons by leaving a copy with the defendant's married daughter, who resided with her husband, in the same house, but in separate apartments, the two households being managed separately, each paying its own expenses and employing its own servants.—HEINEMANN v. PIER, Wis., 85 N. W. Rep. 646.

68. RAILROAD COMPANY—Dangerous Railroad Bridge —Negligence.—The maintenance of a railroad bridge having one overhead beam lower than the other beams, and so low that it may strike employees standing on tops of cars passing through the bridge, and which is not protected by tell-tales or whiplashes, is negligence on the part of the company.—GULF, ETC. RY. CO. v. KNOX, Tex., 61 S. W. Rep. 969.

69. RAILROAD COMPANY — Excavation — Adjoining Property.—Plaintiff deeded defendant a strip of land for a right of way, on which defendant made an excavation of 25 to 40 feet deep, and as wide as the right of way, without shoring up the sides, in consequence

of which plaintiff's adjoining lot caved into the excavation. Held, that plaintiff was entitled to recover damages without proof of negligence on the part of defendant.—MOSIER V. OREGON R. & NAV. CO., Oreg., 64 Pac. Rep. 452.

70. RAILROAD COMPANY—Injury to Stock at Crossing.—The question of the negligence resulting from the failure of a railroad company to construct cattle guards at a private crossing, after request made to an officer whose duty includes the control of such cattle guards, as required by Code, § 2022, should not be submitted to the jury in an action for cattle killed at such a crossing, where the request for the construction of such guards is shown to have been made to officials having no control thereover.—MCGILL V. MINNEAPOLIS & ST. L. R. CO., Iowa, 85 N. W. Rep. 620.

71. RAILROAD COMPANY — Municipal Regulations — Negligence.—The failure on the part of a railroad company and its servants to obey a city ordinance making it the duty of persons in charge of a moving locomotive to ring a bell attached thereto, and providing that no train shall be run backward without a watchman on the rear thereof, is negligence *per se*, and the company is liable for injuries resulting therefrom, unless excused by the contributory negligence of the injured party.—BALTIMORE & O. S. W. RY. CO. V. PETERSON, Ind., 59 N. E. Rep. 1044.

72. RAILROAD COMPANY — Negligence — Proximate Cause.—The mutilated body of plaintiff's intestate, who was a stranger in the village in which he was killed, was found on a side track in defendant's yard, near the body of another stranger, on a certain morning, and it was shown that an engine of defendant had backed over such track, without a light on the tender, at about 5 o'clock on the same morning. There were no eyewitnesses of the accident. Held not sufficient to show that defendant's negligence was the proximate cause of the death of deceased. — PUCKHABER V. SOUTHERN PACIFIC CO., Cal., 64 Pac. Rep. 480.

73. RAILROAD COMPANY — Right of Way — Fences—Pleading.—Under Horner's Rev. St. 1897, §§ 4098a, 4098b (Burns' Rev. St. 1894, §§ 5828, 5824), imposing on railroad companies the duty to fence their rights of way except at highway crossings and within the corporate limits of towns and cities, and providing that, in case they fail to do so, the owner of abutting lands may build the fence, and recover the cost from the railroad company, a complaint in an action by a landowner to recover the cost of building a fence does not state a cause of action if it fails to specifically state that the land fenced is not a highway crossing, or within a town or city, even though it is apparent from the facts pleaded that the place where the fence was erected could not fall within the exceptions of the statute.—EVANSVILLE & I. R. CO. V. BUTTS, Ind., 59 N. E. Rep. 1070.

74. RAILROAD COMPANY—Trespasser—Failure to Observe Ordinance.—The fact that at a certain point in a populous city persons commonly enter on the right of way of a railroad company for the purpose of crossing its tracks, to the knowledge and without the active interference of the company's employees, does not constitute one so doing anything more than a mere trespasser, or charge the company with any greater degree of care to avoid his injury than it owes to trespassers generally.—ILLINOIS CENT. R. CO. V. O'CONNOR, Ill., 59 N. E. Rep. 1098.

75. RAILROAD COMPANY—Trespasser on Bridge—Contributory Negligence.—Plaintiff, a boy 12 or 14 years of age, was not guilty of contributory negligence in remaining on a railroad bridge, after he saw a train approaching, for the purpose of rescuing one of his companions, a girl about the same age, who had fallen between the ties.—BECKER V. LOUISVILLE & N. R. CO., Ky., 61 S. W. Rep. 997.

76. SALES — Action for Value of Goods. — Where an action is brought to recover the value of goods sold and delivered, and the defendant pleads that they were purchased under a special contract, by the terms of which the price is not due, a reply alleging that the special contract was procured through fraud is not a departure. — CROWN CYCLE CO. V. BROWN, Oreg., 64 Pac. Rep. 451.

77. SALE—Warranty—Rescission—Damages.—Where, in an action for *rescission* of a contract for the purchase of machinery, for breach of warranty, the petition claimed damages for freight, drayage, and damages for putting the machinery in place in the building, an exception to the petition on the ground that such items of damage were remote and speculative was properly overruled.—MILLER STONE MACH. CO. V. BALFOUR, Tex., 61 S. W. Rep. 972.

78. SALE OF PERSONALTY—Fixtures—Mortgage.— The vendor of personal property sold to be and in fact attached to real estate by the owner thereof or with his consent, as a permanent improvement, may by contract with such owner preserve the chattel character of the accession. — FULLER-WARREN CO. V. HARTER, Wis., 85 N. W. Rep. 698.

79. TAXATION—Exempt Property. — Under Revenue Act, § 1, providing that all real and personal property in the State shall be taxed, the State cannot tax moneys and credits removed from the State, before the date the property is required to be listed, by a person who had ceased to be a resident before such date.—MAXWELL V. PEOPLE, Ill., 59 N. E. Rep. 1101.

80 TRADE-MARKS—Acquirement — Abandonment.—Where a shoe manufacturer used the word "Knickerbocker," largely in a wholesale and retail shoe business, on shoes manufactured by him, for two years, but not to designate any particular style, and also used other names, but most of which were used for the special goods of particular manufacturers, defendant thereby acquired a trade mark in the word by the course of his business.—BURT V. TUCKER, Mass., 59 N. E. Rep. 1111.

81. VENDOR AND PURCHASER—Deed — Redelivery. — Where the purchasers of land redelivered the deed therefor, claiming that it did not embrace all the tract purchased, and in an action for the balance due on the purchase price the chancellor gave a decree for the balance due, declaring the same to be a lien on the land, and ordering a sale of the land to pay the recovery and costs unless the same were paid within 60 days, the objection that the decree did not order a delivery of the deed or vest title in defendants in case they paid the amount and costs was merely technical.—COLLIER V. PRIMM, Tenn., 61 S. W. Rep. 1088.

82 VENDOR AND PURCHASER — Deferred Payment — Contract to Relieve Vendee.—Where a vendee transfers his contract for the sale of land to a third person, who agrees to assume certain deferred payments, and suit therefor is afterwards brought by the vendor to collect such sum, the payment of costs on a dismissal thereof is not a sufficient consideration for a contract between the vendee and vendor, relieving the former from liability for such deferred payments.—EASTMAN V. MILLER, Iowa, 85 N. W. Rep. 685.

83. WATERS AND WATER COURSES—Irrigation—Unincorporated Association.—Certificates issued by an unincorporated irrigating ditch association to its members, and treated by them as evidence of the right to control its property, and appropriate water by means of a common ditch, must be construed as constituting water-right contracts, and a sale thereof by the holder is, in effect, a conveyance of his water rights and his interests in the property.—BIGGS V. UTAH IRRIGATING DITCH CO., Ariz., 64 Pac. Rep. 494.

84. WITNESSES—Transaction With Person Since Deceased.—Where husband unites with the wife in an action brought in her right, he is not a competent witness for plaintiffs as to a transaction with a person since deceased, as he will, if defeated, be liable, at least, for costs.—DUNN V. DUNCAN, Ky., 61 S. W. Rep. 1011.